In The

Supreme Court of the United States

October Term, 1978

No. 78-386

JEANNETTE C. WALDERT,

Plaintiff-Appellee,

v.

CITY OF ROCHESTER,

Defendant-Appellant,

and

THOMAS R. FREY,

Intervenor-Defendant-Appellant.

On Appeal From The Court Of Appeals Of The State Of New York

JURISDICTIONAL STATEMENT

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Appellants City of Rochester and Thomas R. Frey are appealing from the decree of the New York Court of Appeals, dated June 8, 1978, insofar as that decision upheld the scheme of property tax limits in Article VIII, Section 10 of the New York Constitution as it applies to the City of Rochester. Appellants submit this jurisdictional statement to show that this Court has jurisdiction of the appeal and that a substantial federal question is presented.

The citations to the opinions below are as follows:

> *Waldert v. City of Rochester*, 44 N.Y.2d 831, 406 N.Y.S.2d 752 (1978); 61 A.D.2d 147, 402 N.Y.S.2d 655 (App. Div., 4th Dept. 1978); 90 Misc.2d 472, 395 N.Y.S.2d 939 (Sup. Ct., Monroe Co. 1977).

This action was brought by appellee Waldert against the City of Rochester for a declaratory judgment declaring New York Laws of 1976, chapter 349, unconstitutional, and declaring the 1976-77 real property tax levy of the City of Rochester to be illegally in excess of the real property tax limit in Article VIII, Section 10 of the New York Constitution. The City of Rochester defended the action on the grounds that L. 1976, c. 349 was constitutional under the New York Constitution, and that the tax limits in Article VIII, Section 10 of the New York Constitution were themselves unconstitutional under the Fourteenth Amendment to the United States Constitution. Thomas R. Frey, a citizen and taxpayer of the City of Rochester, was permitted to intervene by order of the Supreme Court, Monroe County, for the purpose of arguing the Fourteenth Amendment issues.

The decree sought to be reviewed in this appeal was rendered by the New York Court of Appeals in its Remittitur dated and entered June 8, 1978. The Notice of Appeal was filed on June 15, 1978, with the Clerk of the Supreme Court, Monroe County, New York, the court possessed of the record.

Jurisdiction of this appeal is conferred on this Court by 28 U.S.C. §1257(2).

Because this Court's jurisdiction is conferred by 28 U.S.C. §1257(2), no cases are relied upon to sustain jurisdiction.

At issue in this appeal is the validity, under the Fourteenth Amendment to the United States Constitution, of Article VIII, Section 10 of the New York Constitution. (The text of Article VIII, Section 10 is set forth in the Appendix.)

QUESTIONS PRESENTED

1. The first question presented in this appeal is whether, as appellants contend, the property tax limits in Article VIII, Section 10, of the New York Constitution are unconstitutional under the Fourteenth Amendment to the United States Constitution. In particular, the question presented is whether the state tax limits, unequal on their face, deny to the citizens of the City of Rochester the equal protection of the laws and due process of law because the more stringent tax limit imposed upon Rochester prevents access for its citizens to the same level of municipal and school services which is available to citizens of the state's smaller cities and other municipal jurisdictions.

2. The second question presented in this appeal is whether, as appellants contend, summary judgment was improperly granted in the state courts below to the appellee. In particular, the question presented is whether the appellants have set forth in the record facts sufficient to require a trial of any issues of fact relating to the appellants' equal protection and due process claims.

In this Court, as in all the state courts below, appellants argue not for summary judgment in their favor, but only for a reversal of summary judgment to appellee Waldert so that there can be a trial on the Fourteenth Amendment claims. Thus, the appellants bring this appeal in order to demonstrate that their Fourteenth Amendment claims have sufficient merit to warrant development of a full record at trial.

STATEMENT OF THE CASE

Article VIII, Section 10 of the New York Constitution sets different limits on the annual local property tax levy of certain types of municipalities and school districts, and no limits on others. Where a limit is imposed, it is framed in terms of a given percentage of the previous five-year average full valuation of the taxable real property within that municipality or district. Each limit is on taxes levied for operating expenses; excluded from the limits are taxes levied to pay debt service, or to pay for items of expense with a useful life exceeding one year. The limits specify that the taxes must be used for particular categories of municipal purposes.

The limits set may be charted as follows:

Type of Municipality	Purpose of Taxes	Tax Limit (% of full value)
Cities over 125,000 population (hereinafter "large cities")	City and school purposes	2%
Cities under 125,000 population (hereinafter "small cities")	City purposes	2%
School districts in cities under 125,000 population	School purposes	1¼% - 2%
City of New York	City, school and county purposes	2½%
Villages	Village purposes	2%
Counties	County purposes	1½% - 2%

In counties and in school districts in small cities, the limit may be raised incrementally within the allowable range — in counties, by either the governing body or referendum of the voters, and in school districts in small cities, by referendum of the voters. For school districts outside the cities, there are no tax limits although the school budget must be approved by the voters annually. For towns, some of which are larger than most cities, there are no tax limits of any kind.

As actually written, the state constitution appears to impose the same 2% limit "for city purposes" on large cities as on small cities. (Appendix p. A-1) However, by long-standing tradition the limit on large cities has been held to include taxes for school purposes while the limit on small cities does not; indeed, as indicated in the chart above, school districts in small cities have an independent tax limit potentially as large as the limit for cities themselves. The effect of this is to allow citizens of small cities to levy up to twice the amount of property taxes for city and school purposes as citizens of large cities can.

In the state courts below the appellants urged that the phrase "for city purposes" in the state constitution be interpreted identically for large and small cities. Such an interpretation would have corrected the substantial inequality of treatment between large and small cities. However, the appellee opposed this interpretation and the state courts below rejected it, thus settling finally the state's interpretation of its tax limits.[1]

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[1]The appellee here, Waldert, brought this action against the City of Rochester alleging that Rochester's tax levy exceeded its 2% tax limit in the fiscal year 1976-77. The major state issue was whether chapter 349 of the 1976 Laws of New York, which allowed Rochester (and other large cities) to levy property taxes in excess of the tax limit to pay for employee pension and social security costs, violated the state constitution. The state courts held that pension and social security costs were operating costs and could not be exempted from the tax limit of the state constitution by mere act of the legislature. It was in this context that Rochester also urged the non-traditional interpretation of the phrase "for city purposes". Rochester's 2% tax limit for 1976-77 was $42,803,962; its tax levy for that year, including operating, pension, and social security costs for both city and school purposes was $71,798,131. If Rochester had been allowed the tax limits given to small cities and school districts in small cities, the challenged tax levy would have been legal and valid. As it is, however, Rochester has had to roll back its property taxes by approximately $30,000,000 and may have to refund millions more.

In this appeal, the appellants urge that Article VIII, Section 10 of the New York Constitution must fall as a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[2] The scheme of tax limits prescribed by that section arbitrarily and irrationally deprives citizens of large cities such as Rochester of the ability to provide for themselves the same high level of municipal and school services as is available to citizens of other municipalities.[3] Such irrational and invidious discrimination contravenes the Equal Protection Clause of the Fourteenth Amendment.

Both the City of Rochester, on behalf of its citizens who thus suffer discrimination, and Thomas R. Frey, on his own behalf as an individual Rochester citizen who thus suffers discrimination, appeal to this Court to reverse the decision below insofar as it

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[2]In many instances there are common threads of analysis established by this Court between equal protection cases and due process cases.

> One aspect of fundamental fairness, guaranteed by the Due Process Clause of the Fifth Amendment, is that individuals similarly situated must receive the same treatment by the Government. *Department of Agriculture v. Murray*, 413 U.S. 508, 517 (1973). See also: *Frontiero v. Richardson*, 411 U.S. 677, 680, n.5 (1973), and *Califano v. Goldfarb*, 430 U.S. 199, 223 (1977).

Appellants have limited their analysis to the equal protection issue. However, because violations of the Equal Protection Clause often necessarily mean violations of the Due Process Clause as well, it is appellants' position that the tax limits in this case violate both the Equal Protection and Due Process Clauses.

[3]For example, not only do small cities have greater taxing power than large cities, but many of those small cities in fact take advantage of that power to impose tax levies which would exceed the 2% limit of a large city. See table (pp. 9-10), which shows that the combined city and school taxes in many small cities in New York State in 1976-77 considerably exceeded 2% of their five-year average full value. Another example of the arbitrary and irrational character of the tax limit scheme is that it allows the Town of Hempstead, N.Y., merely because it is a town and not a city, to levy property taxes without limit, although Hempstead's population is more than 800,000 — three times Rochester's.

granted summary judgment to the appellee Waldert upholding this discriminatory scheme of tax limits in the New York Constitution as it applies to the City of Rochester.

HOW THE FEDERAL QUESTION WAS PRESENTED

The question of the constitutionality of Article VIII, Section 10, of the New York Constitution under the Fourteenth Amendment to the United States Constitution was originally raised as a specific defense in the answer of the appellant City of Rochester and in the answer of the intervenor-appellant Thomas R. Frey (R. 89, 183-84). The appellee Waldert moved to strike that defense, among others, as being without merit and for summary judgment. The court of original jurisdiction granted those motions. Procedurally, then, each appeal, including this one, has sought reinstatement of the defense raising the federal question, as having merit, and a trial of the factual issues presented by that defense. The federal question was raised by the appellants' Notices of Appeal at each level, which specified that an appeal was taken from all issues which had been decided adversely to appellants, including the federal question (R. 3-8, 40-41, A-4, 5).

The federal question was fully briefed and argued in the Special Term of the Supreme Court, Monroe County, the court which heard this case originally, and also in the two appellate courts, the Appellate Division of the Supreme Court, Fourth Department, and the New York Court of Appeals. The two lower state courts addressed the federal question in their opinions. The Special Term, in upholding the tax limits, held, in pertinent part, as follows:

> For me to hold that [Article VIII, Section 10] is unconstitutional and in conflict with the Fourteenth Amendment would emasculate all of New York State's tax and debt limits. This I am not about to do. The dif-

ferences between the debt [sic][4] limits in school districts in cities of over 125,000 and under 125,000 population represents a matter of public policy which was settled when the New York Constitution was adopted by the people. (R. 66) 90 Misc.2d 472, 480-81.

On appeal, the Appellate Division affirmed, devoting only three paragraphs to its equal protection analysis. In support of its finding of a rational basis for the tax limits, the court cited one case, *Magoun v. Illinois Trust & Savings Bank*, 170 U.S. 283, 296 (1898). In addition, the court stated, without discussion, that it rejected "appellant's argument that there are questions of fact presented in the record which require a hearing on the [equal protection] issue." (R. 34-35) 61 A.D.2d 147, 164.

Although, as noted, the federal question was fully briefed and orally argued in the New York Court of Appeals, that court was silent on the equal protection issue in its per curiam opinion affirming the Appellate Division.

[4]Debt limits are set forth in Article VIII, Section 4 of the New York Constitution, and are not in issue in this case.

OPERATING TAX LEVIES IN CITIES UNDER 125,000, 1976-77, EXPRESSED AS PERCENTAGE OF FULL VALUE OF TAXABLE REAL PROPERTY.
(Includes taxes for pension & social security costs)

City	City Levy	City School District Levy	Total Tax Levy
Albany	1.56	1.63	3.19
Amsterdam	1.04	1.33	2.37
Auburn	1.05	1.75	2.80
Batavia	0	1.96	1.96
Beacon	1.94	1.44	3.38
Binghamton	2.00	2.07	4.07
Canandaigua	.21	1.35	1.56
Cohoes	1.56	1.84	3.40
Corning	.73	2.08	2.81
Cortland	.84	1.90	2.74
Dunkirk	.93	1.48	2.41
Elmira	1.53	1.91	3.44
Fulton	.15	2.09	2.24
Geneva	1.07	2.03	3.10
Glen Cove	1.12	2.54	3.66
Glens Falls	1.32	2.22	3.54
Gloversville	.56	.81	1.37
Hornell	0	1.55	1.55
Hudson	1.35	1.86	3.21
Ithaca	.68	2.05	2.73
Jamestown	1.13	1.45	2.58
Johnstown	.85	.90	1.72
Kingston	1.46	2.44	3.90
Lackawanna	1.37	1.78	3.15
Little Falls	1.40	1.22	2.62
Lockport	1.03	2.00	3.03
Long Beach	1.50	2.55	4.05
Mechanicville	1.09	1.96	3.05
Middletown	1.74	1.94	3.68
Mount Vernon	1.66	2.82	4.48
Newburgh	1.76	2.45	4.21
New Rochelle	1.74	2.66	4.40
Niagara Falls	1.83	2.20	4.03
North Tonawanda	.94	1.89	2.83
Norwich	.43	1.80	2.23
Ogdensburg	1.68	1.42	3.10
Olean	.73	1.94	2.67

OPERATING TAX LEVIES IN CITIES UNDER 125,000, 1976-77, EXPRESSED AS PERCENTAGE OF FULL VALUE OF TAXABLE REAL PROPERTY.
(Includes taxes for pension & social security costs)

City	City Levy	City School District Levy	Total Tax Levy
Oneida	.41	1.50	1.91
Oneonta	1.36	1.66	3.02
Oswego	.76	1.63	2.39
Peekskill	1.85	3.14	4.99
Plattsburgh	.22	1.57	1.79
Port Jervis	.89	1.37	2.26
Poughkeepsie	1.93	2.49	4.42
Rensselaer	1.70	1.95	3.65
Rome	1.03	1.39	2.42
Rye	1.28	2.36	3.64
Salamanca	1.85	1.23	3.08
Saratoga Springs	.82	1.38	2.20
Schenectady	1.69	1.84	3.53
Sherrill	.87	1.32	2.19
Tonawanda	1.16	1.59	2.75
Troy	1.11	2.54	3.65
Utica	1.78	1.67	3.45
Watertown	.91	1.79	2.70
Watervliet	1.02	1.88	3.90
White Plains	1.27	2.06	3.33

Sources: Charts prepared by the State of New York, Department of Audit and Control, Division of Municipal Affairs, Bureau of Municipal Research and Statistics: "City School Districts in Cities Under 125,000 Population, Tax Limit Data for Fiscal Year 1976-77." "Cities: Percent of Tax Limit Used 1977," March, 1978.

THE FEDERAL QUESTION IS SUBSTANTIAL

Appellants contend that the different property tax limits set forth in Article VIII, Section 10 of the New York Constitution deny to the citizens of the City of Rochester the equal protection of the laws.

Appellants further contend that this equal protection claim should not be decided on a motion for summary judgment. The factual issues concerning the impact of different property tax limits on the various local municipalities in New York State are enormously complex. Furthermore, while appellants have made a *prima facie* factual showing on the record supportive of their equal protection claim, appellee Waldert has relied only on conclusions of law and has failed to set forth any facts with which to rebut appellants' factual showing.

By way of introduction to Point I set forth below, it should be noted that the issue of placing legal limits on the levying of real property taxes has recently become an important concern throughout the nation, as illustrated by "Proposition 13" approved in California. Similar tax limit provisions are being proposed in other states. While this case does not arise out of a widespread "tax revolt" in Rochester, New York, it nevertheless presents this Court with a timely and appropriate opportunity to address the question of what guidelines must be met for tax limit schemes to pass federal constitutional muster.

In order to appreciate the claim of the appellants that New York's current scheme of tax limits deprives Rochester residents of the equal protection of the laws, it is necessary to understand how tax limits operate. A tax limit only comes into play at that point when the normal processes by which local budgets and tax levies are determined push the dollar amount of the tax levy up to the limit, and would push it higher except for the limit. That is to say, if the local elected officials who pass the budget and levy the taxes for a particular municipality choose to impose a

tax levy well below the limit, then the limit is of no effect; it protects no one and it hinders no one. However, once that point is reached, where the tax levy is right up to the limit, it is crucial to see exactly whose interests are involved: who is being protected and who is being hindered.

It is perhaps obvious but nonetheless important to note that the people who pay local taxes are, by and large, the same people who benefit from the municipal and school services which those tax dollars make possible. They are also, by and large, the same people who elect the local officials who pass the annual municipal and school budgets and levy the annual municipal and school taxes. Those local residents have to balance for themselves the opposing ideals of lower taxes with a correspondingly lower level of municipal and school services, against higher taxes, with a correspondingly higher level of services. As taxpayers, they benefit from lower taxes; but as local residents and parents, they benefit from higher municipal and school services. As voters, they are called upon to balance the two ideals and elect officials who will implement that chosen balance.

Any tax limit is also necessarily a spending limit; they are two faces of the same coin. If a municipality or school district is limited in the amount of tax revenue it can collect, it is also necessarily limited in the amount it has to spend. As a limit on taxes, the limit benefits residents; but as a limit on spending, and thus on services, it hurts them.

This is not to say that tax limits in themselves are inappropriate. It is clearly within the power of the state to declare that, regardless of the will of the residents of any particular taxing jurisdiction, a certain level of local taxation may not be exceeded, even though that necessarily curtails the level of local spending.

The problem is not with tax limits per se, but with tax limits which apply unequally to different taxing jurisdictions. A

rational and equitable system of tax limits may hamper the desires of some individual local residents who would prefer a level of taxation and spending in excess of that permitted, but at least it does so constitutionally. But when a system of tax limits imposes a substantially lower tax limit on certain jurisdictions than others, for no reason, then the citizens of those jurisdictions are arbitrarily deprived of important municipal and educational services which citizens elsewhere can provide for themselves, and that is unconstitutional.

The pernicious effect of a discriminatory tax limit comes really from its obverse aspect as a spending limit. It may seem disingenuous for a taxpayer to assert that he is injured by a too-strict limit on the amount of money which his local government can exact from him in taxes. But it is not at all unreasonable for a taxpayer to assert that he is injured by a too-strict limit on the amount of money which his government can spend to provide municipal and educational services for him and his family. It distorts the real effect of tax limits to characterize them merely as limitations on the local governments to which they apply. The government is, in a sense, no more than a conduit which turns tax dollars from local residents into municipal and school services for those same residents. The government has no need for taxes other than to provide the services demanded by its citizens.

In 1976-77 (the tax year in issue here), the City of Rochester levied property taxes in excess of its tax limit (see footnote 1 above at page 5). That tax levy was authorized by the City Council, acting on behalf of and in the interest of the citizens of Rochester. Under that tax levy, many city and school services were provided to Rochester citizens which could not have been provided by a lesser tax levy. In the same year many of the state's small cities, combined with their school districts, levied property taxes well in excess of the limit imposed on Rochester (see table, pp. 9-10). In those cities also, the determination was

presumably made that the local residents were willing to pay that amount in taxes, in return for the city and school services provided. In small cities such a tax levy is lawful. But as a result of the decision of the state court below, upholding Rochester's tax limit, Rochester has had to roll back its property taxes by approximately $30,000,000. The resulting levy is not only drastically lower than the amount already approved by the City Council, with the mandate of city voters, but also, and more significantly, much lower than the amount which small cities have levied in the past and will be able to continue to levy in the future. That unequal treatment of the City of Rochester and its residents violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

POINT I

Article VIII, Section 10 fails to meet the requirements of the Equal Protection Clause.

Since the decision in *Mugler v. Kansas*, 123 U.S. 623 (1887), this Court has continued to hold that in the enactment of a law — whether statutory or constitutional[5] — the means chosen by the state to carry out a state power must have a real and substantial relation to a legitimate object which the state intends to further. *Reed v. Reed*, 404 U.S. 71, 76 (1971), citing *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). Under the Equal Protection Clause of the Fourteenth Amendment, classifications made by a state for the purpose of treating people unequally must bear some articulated, rational relationship to a legitimate state purpose. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 17 (1973); *Reed*, 404 U.S. at 76. Such state legislative classifications must fail if they are arbitrary and without such a rational basis. *Id.* at 76-77.

This equal protection principle has been applied by federal courts to classifications made by a state for tax purposes. In *Hargrave v. Kirk*, 313 F. Supp. 944 (M.D. Fla. 1970) (vacated, sub nom. *Askew v. Hargrave*, 401 U.S. 476 (1971)), the District Court struck down a Florida tax limit classification on equal protection grounds.

This Court vacated that judgment on abstention grounds. The District Court's equal protection analysis was neither approved

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[5]In ruling upon the constitutionality of a state enactment, this Court has not distinguished state statutes from state constitutions. "With respect to the Equal Protection Clause, it makes no difference whether a state's apportionment scheme is embodied in its constitution or statutory provisions." *Reynolds v. Sims*, 377 U.S. 533, 584 (1964). Provisions of the New York State Constitution have been found invalid in the cases of *WMCA Inc. v. Lomenzo*, 377 U.S. 633 (1964), and *Katzenbach v. Morgan*, 384 U.S. 641 (1966). See also *Carrington v. Rash*, 380 U.S. 89 (1965), invalidating a section of the Texas State Constitution.

nor disapproved by this Court. However, because the tax limit issue involved in *Hargrave* is so closely analogous to the tax limit issue in this case, the District Court's opinion is discussed here as an example of judicial analysis of a very similar equal protection issue. Furthermore, this Court's comments on the summary judgment issue in the *Hargrave* case support the appellants' position that summary judgment was improper in the case at bar, and that a trial is required before it can be determined whether a complicated tax limit system does or does not violate the Equal Protection Clause. 401 U.S. at 478-79.

The issue in the *Hargrave* case was the constitutionality of a state "Millage Rollback Act" which provided that any county which imposed more than 10 mills in *ad valorem* property taxes for educational purposes would not be eligible to receive state minimum funding for support of its education system. When the act went into effect, 24 Florida counties had to roll back their tax levies to the 10-mill limit. The result was a reduction of fifty million dollars in local tax revenues. Furthermore, and more crucial to the *Hargrave* court, the rollback act created inequalities in taxing power among Florida counties, so that one county, by using the 10-mill limit, was able to raise by its own taxes $125.00 per student, while a poorer county could raise only $52.00 per student. Thus the act prevented poor counties from providing from their own taxes the same support for public education which the wealthy counties were able to provide. *Hargrave*, 313 F. Supp. at 947. And, for many counties, the act, in effect, *required* the poorer districts to spend less on education than they had chosen to spend prior to the act.

The *Hargrave* court concluded that there was no rational basis for preventing poorer areas from providing for themselves as good an education for their children as wealthy areas could. *Id.* at 948. The Equal Protection Clause forbids a state from allocating the authority to tax according to a formula based on a jurisdiction's property valuation, when the effects of such a scheme are discriminatory. *Id.* at 949.

The situation in *Hargrave* is similar to that in the case at bar. Although *Hargrave* dealt only with tax levies for education, the analysis is equally valid for the present case, which involves tax levies for general city purposes as well as for education. The citizens of Rochester are prevented, by the more stringent tax limitation imposed upon New York's large cities, from taxing for education and for city services to the same extent as smaller jurisdictions in the state. As stated by the *Hargrave* court:

> The legislature says to a county, 'You may not raise your own taxes to improve your own school system, even though that is what the voters of your county want to do'. We have searched in vain for some legitimate state end for the discriminatory treatment imposed by the Act. *Id.* at 948.

This is the precise situation in the case at bar. The citizens of Rochester, through their elected representatives, approved the 1976-77 tax levy. That level of taxation would be valid and allowable in a city under 125,000, as well as in a town or village. Thus, the scheme of tax limits in Article VIII, Section 10 imposes on Rochester's taxpayers the taxing straitjacket which was found intolerable by the District Court in *Hargrave* under the Equal Protection Clause.[6]

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[6]Note that the case at bar, like *Hargrave*, raises an equal protection issue which differs from those raised in *Rodriguez* and several state court decisions (E.g. *Serrano v. Priest*, 557 P.2d 929, 135 Cal. Rptr. 345 (1976), *Robinson v. Cahill*, 62 N.J. 473 (1973)). Those cases dealt with state-wide equalization of expenditures for education. The case at bar concerns the equalization of local taxing power — what each municipality is allowed to raise through its own local taxes — not the redistribution of tax revenues among the state's jurisdictions. Appellants are not asking for additional state revenues or revenues from other local jurisdictions, but only for equal authority to raise taxes locally.

The *Rodriguez* Court recognized the difference between these types of equal protection claims, and noted specifically that it was not reaching the issue of unequal tax limits. *Rodriguez*, 411 U.S. at 50, n. 107, citing *Hargrave*.

These equal protection principles, applied to state classifications relating to tax revenues, were confirmed by this Court in the case of *Levy v. Parker;* 346 F. Supp. 897 (E.D. La. 1972), *aff'd,* 411 U.S. 978 (1973). The *Levy* case involved a Louisiana statute which provided for the reimbursement by the state to local governments of revenue lost through a homestead tax exemption. However, the state payments to the local governments, under the state statute, were inequitable because they were based on incomparable local tax rates as well as inequitable assessments, which ranged from 5.7% to 24.5% of market value. The result of the state aid scheme was that one county received $35.00 per homestead exemption, while another county received $198.00 per exemption. This inequality was duplicated across the state. 346 F. Supp. at 899-901.

The District Court in *Levy* held that all government action that has arbitrary impact, even though not originally intended, violates the Equal Protection Clause. The court found the revenue sharing scheme, which provided widely differing revenues per capita, to be a wholly arbitrary method of distributing state funds. The *Levy* court said:

> We consider here only the combination of unequal assessments, limitations on the taxing power of a local government, and facially nondiscriminatory payment of state revenues to localities based upon prevailing local millage rates, and we conclude that this scheme of payment is constitutionally infirm as it is applied in fact. 346 F. Supp. at 905.

The *Hargrave* and *Levy* cases show that the Fourteenth Amendment requires that any government-imposed classification, including classifications of local governments, be rational and serve a specific governmental interest. The constitutional rights of local residents cannot be abridged by a state imposing discriminatory restrictions on the local government in which they reside.

A. *Governmental classifications affecting municipal and educational services require careful scrutiny under the Equal Protection Clause.*

The Equal Protection Clause requires careful scrutiny of the underlying reason for any governmental classification. The almost automatic deference shown in earlier Supreme Court cases to state legislative classifications has evolved into a closer scrutiny by this Court of the actual rationale of the legislature. *Weinberger v. Weisenfeld,* 420 U.S. 636, 648, n.16 (1975). The Court no longer upholds legislative classifications when the only supporting rationale which can be offered is some hypothetical and imaginary state of facts. E.g., *Craig v. Boren,* 429 U.S. 190, 210, n.23 (1976).

In addition, even if a valid rationale existed at one time, a court must look to the current effects of a legislative classification. As this Court stated in the recent case of *Califano v. Goldfarb,* 430 U.S. 199 (1977), some classifications may be revealed on analysis to rest only upon "old notions" and "archaic and over-broad" generalizations, and thus violate the Equal Protection Clause. 430 U.S. at 211. The Court found that Congress had "proceeded casually on a 'then generally accepted' stereotype" which, the Court found, led to an arbitrary classification. *Id.* at 217, n.18.

In both the *Weisenfeld* and *Goldfarb* cases, the Court made a detailed examination of the legislative history of the provisions of the Social Security Act at issue in those cases, and focused on the actual rationale articulated there by the legislature. In *Craig,* the Court made a detailed examination of the current statistical sociological data related to the gender-based classification at issue in that case. The Court found that, though there was some statistical evidence supporting the legislative classification, the evidence was considered an "unduly tenuous 'fit' ". 429 U.S. at 201-02. In all these cases, none of which involved "suspect" classes or "fundamental rights", the Court struck down the challenged classifications, after its searching

inquiry failed to turn up a justification for the classification which was not only plausible, but also both reasonable and based on fact.

In addition to the Court's emphasis on the factual basis for legislative classifications, the Court's recent decisions have modified the "two-tier" approach to equal protection questions, in that the Court now demands a more meaningful and substantive rationality even of classifications which are not "suspect" and thus do not warrant "strict scrutiny". In *Reed v. Reed*, 404 U.S. 71 (1971), a unanimous Court struck down a non-"suspect" state classification, even in the face of plausible reasons for the classification. The Court held that the classification was arbitrary under the Equal Protection Clause because the reasons articulated by the state in support of the classification were not substantially related to the type of classification made. *Id.* at 76-77. Likewise, the *Craig* Court, recognizing the important interests involved, held that:

> To withstand constitutional challenge ... classifications by gender [not a "suspect" class] must serve important governmental objectives and must be substantially related to achievement of those objectives. 429 U.S. at 197.

These cases indicate that all governmental classifications, and especially those which affect important interests, require careful, detailed scrutiny under the Equal Protection Clause.

The interests at stake in this case — education and municipal services — are of crucial importance to the residents of Rochester and New York's other large cities. It is undeniable that education is a necessity in this society and is considered by all citizens to be a basic right. The New York Constitution expressly mandates that the state shall "provide for the maintenance and support of a system of free common schools, wherein all the children of the state may be educated." *N.Y. Constitution*, Art. XI, §1.

In *Brown v. Board of Education of Topeka*, this Court was unanimous in its characterization of education as basic to our way of life. 347 U.S. 483, 493 (1954).

Like education, the right to city services is a basic and high-priority right. Police and fire protection are essential to the physical safety and well-being of residents of all communities. Street construction, maintenance and cleaning, garbage collection, water distribution, public parks — all have come to be accepted as basic amenities of life in today's world. Any restriction on the ability of local governments to provide for their citizens these necessary basic services should be scrutinized most carefully by a court.

The problems associated with urban growth in recent decades have been well publicized: crime, substandard housing, blighted neighborhoods, inadequate street lighting, garbage, rodent control. It is particularly essential that the residents of large cities, where these problems are most acute, not be irrationally deprived of the means for fighting the problems and improving their environment. Businesses and residents who choose to locate in cities, who make the commitment to help preserve cities as viable places to live and work, must be permitted to obtain the municipal services they deem necessary, in return for their tax dollars.

The classifications in issue in this case, by which different municipalities and school districts are given different taxing power, does in fact have the effect of depriving citizens of large cities, such as Rochester, of the right to the same level of city services and public school services as is available to citizens of small cities, towns and villages.[7]

First, as to school services, residents in central school districts, central high school districts, union free school districts, and

[7]The court below noted other taxes authorized in various state laws (A-12). However, these taxes are either state taxes, New York City taxes, or statewide local taxes which do not compensate for the restrictive property tax limit imposed only upon large cities.

common school districts, have no limit at all on the taxes they can raise to pay for the operation of their schools. Each year they vote, at a referendum, on the annual school budget. The voters can weigh for themselves the situation in their district, and whether the particular expenditures proposed in the budget warrant the taxes necessary to pay those expenses. If they feel that a lesser level of expenditure is appropriate, they can turn down the budget until it is reduced to the desired level. If, however, they want to provide more revenue in order to implement more or better programs, they have that option as well. Those resident parents who rate the education of their children as a high priority, if they are a majority in the district, can approve annual school budgets which call for a high level of expenditure, without the constraint of a tax limit.

Residents in city school districts in cities under 125,000 are somewhat more restricted. They have the option of raising the quality of their public school services only so long as the desired expenditures require an annual tax levy not in excess of their tax limit, ranging from 1¼% to 2% of the full valuation of taxable real property in the district. Since the limit can be raised within that range by referendum in the district, if enough of the residents favor higher expenditures and higher taxes, they can by vote raise the limit up to 2%. Thus, small-city residents have available to them that level of public school quality which can be funded from an annual 2% tax levy.

Residents of large-city school districts such as the Rochester City School District are the most restricted of all. Since the 2% tax limit which applies to cities over 125,000 applies not only to the taxes levied to pay for city services, but to the school taxes levied to fund the city school district as well, Rochester residents can obtain only that level of quality of public school services which can be funded from the school portion of the overall 2% limit. In Rochester, by agreement between the City and the School District, that portion is 60%, or a tax limit of 1.2%.

Thus, a very real effect of the system of tax limits in Article VIII, Section 10 is to infringe upon the right of residents of large cities such as Rochester to obtain high-quality education in their public school system.

Secondly, as to municipal services, Rochester residents are again deprived of the ability to obtain the same level of services as residents of other municipalities. Towns have no tax limit; town residents can tax at any level they choose to provide town services. (For example, the highly urbanized Town of Hempstead, N.Y., with 800,000 population — three times the size of Rochester's — has no tax limit.) Villages have a 2% tax limit for village taxes, (which includes no school taxes). Since villages are within towns, village residents can obtain village services up to that level which can be financed by an annual 2% tax levy, and town services at an unlimited level.

Small-city residents, again, are somewhat more restricted. They can obtain that level of city services which can be provided by an annual 2% tax levy.

Residents of large cities such as Rochester are, once more, the most restricted of all. They can provide for themselves only that level of city services which can be financed from the City's portion of the overall 2% city and school tax limit. As Rochester's agreement allocates 40% of the limit to the City, it has an effective 0.8% tax limit for city taxes.

Because of the critical nature of education and municipal services, this Court should look closely at legislative classifications, such as those in Article VIII, Section 10, which affect the ability of local governments to provide those services. The Equal Protection Clause requires that the tax limit classifications be rationally related to a legislative objective. Because of the important interests involved in this case, the rationality of the tax limits and how the tax limits relate to a legislative objective should be required to be clearly demonstrated before judgment is rendered upholding the tax limits.

However, Waldert has not made that showing in this case. Indeed, the following review of the legislative history and the current circumstances relating to the tax limits demonstrates that the tax limit classifications are not rationally related to any legislative objective.

B. *Legislative History*

As directed by this Court in *Weisenfeld*, it is necessary to examine the actual, articulated, historical basis for the challenged classification, to determine at least what its original justification was. An analysis of the historical and current situations surrounding the system of tax limits in Article VIII, Section 10 demonstrates no viable rationale for the discriminatory tax limits.

The present State Constitution was adopted in 1938; Article VIII, Section 10 provided a system of tax limits on different municipalities. The differentiation between large and small cities in the current version of Article VIII, Section 10 dates back to the 1938 version, in which such a differentiation was also made, although not in the same form as today. The rationale for that distinction had to do with historical differences in the development of school districts in large and small cities.

Under the law at that time, a school district in a city was permitted to annex territory outside, but contiguous to, the city, thereby becoming an "enlarged" district. Any such "enlarged" district was allowed by law to incorporate independently of its city, with independent taxing and borrowing powers. A non-"enlarged" district was operated as a department of the city government. In the period before 1938, many of the school districts in smaller cities took advantage of these provisions, and became "enlarged" and fiscally independent. At that time, there was nothing in the law to prevent large-city school districts from becoming "enlarged" districts, but, for whatever reason, the historical fact is that none of them did. In 1938, all seven of the

school districts in cities over 100,000 were not "enlarged" districts, and were thus not independent of the city governments. *Report of the Constitutional Convention Committee, 1938, Taxation and Finance,* at 238.

The administrative problems of imposing a single tax limit on two overlapping independent tax authorities, such as the "enlarged" city school districts and their cities, were reflected in the language of the 1938 Constitution. Article VIII, Section 10 imposed a 2% tax limit on all cities over 100,000 population, and provided that that limit would be extended to apply to all cities as of 1944. However, there were two provisos in that section which allowed school taxes in certain cities to be excluded from the city's tax limit. One stated that the school taxes of any "enlarged" city school district would be excluded from the city's tax limit automatically, and the other allowed the legislature to exclude all or part of the school taxes in any other city under 100,000 from the city's tax limit. Those exclusions were clearly geared to the dilemma of the fiscally independent "enlarged" city school districts. Those school districts determined their annual tax levies independently of their city governments, and the administration of both the city and the school district would have been hampered if both tax levies had been required to fit under a single tax limit. The effect of the exclusions was that those cities and their school districts could levy their taxes independently, without having to contend over whose levy had to be cut if the limit was exceeded.

In 1949, Article VIII, Section 10 was amended to give all school districts in cities under 125,000 a separate tax limit. Administrative confusion had apparently resulted from having some small-city school districts tied to their cities, as city departments, and some independent of their cities, as "enlarged" districts. In order to unify and simplify school administration, it was proposed to make all school districts in cities under 125,000 fiscally independent. But under the 1938 wording of Article VIII,

Section 10, not all such school districts were independent of their cities' tax limits. In order to accomplish the needed reform of school administration, the constitution was changed in 1949 to give all school districts in cities under 125,000, whether "enlarged" districts or not, a separate tax limit. See Historical Note to Education Law §2501, *McKinney's Cons. Laws* p. 83-84.

Thus, it is crucial to observe that the reason behind the unequal treatment of large and small cities in the 1938 and 1949 versions of Article VIII, Section 10 had to do with solving problems in the administration of school districts, totally unrelated to the taxing or spending needs of large cities versus small cities, or large-city school districts versus small-city school districts.

One way to give small-city school districts an independent tax limit would have been simply to split the previous 2% tax limit in half, and give 1% to the city and 1% to the school district. But that would have worked a hardship on the city or on the school district, whichever had previously been using more than half of the joint tax limit. In order to give uniform, separate limits, without reducing the limit of any city or school district, the city was allowed to keep the same 2% limit as before, although it no longer had to fund its schools, and the school district was given its own limit, ranging from 1¼% to 2%.

The effect of the tax limits as formulated in 1938 and 1949 was to permit dramatically higher city and school taxes in small cities than in large cities. But that discrepancy clearly was not based upon any finding that small cities had any need for or right to greater taxing power than large cities. Rather, it was a by-product of the solution of another problem — the administrative difficulties of "enlarged" and other school districts in small cities. As in the *Goldfarb* case discussed above, where Justice Stevens found that the legislature had never focused on the discrimination created by a legislative classification, the state legislature in this case never focused on the inequality in

local taxing power created by the special treatment accorded small-city school districts. Also as in *Goldfarb*, this legislative classification thus created cannot stand absent a rationale which is reasonably related to a legitimate state purpose.

Unconstitutional discrimination is not justified merely because it solves an administrative problem. It was incumbent upon the legislature in 1949 to preserve the equity between small and large cities when it established independent taxing power for small-city school districts. It could have done that by raising the limit for large cities, or by giving large cities an independent taxing limit for their school taxes. Either way, small-city school districts would have been given fiscal independence without creating an irrational and unconstitutional discrimination between small and large cities. The foregoing historical analysis of the tax limit provisions of Article VIII, Section 10 discloses no rationality behind the discriminatory treatment of large cities which can serve to justify that discrimination under the tests of the Equal Protection Clause.

C. *Municipal and Educational Overburdens*

Is there some other actual, current reason for allowing residents of small cities and other municipalities to raise more tax dollars for municipal services and for education than large-city residents? Do small cities and other municipalities perhaps have a greater need than large cities for tax dollars in order to carry out their public responsibilities? If that were true, it might serve as at least some rationale, though certainly not articulated anywhere, for the current discriminatory tax limits.

But an examination of the actual situation in large cities as compared with other municipalities proves just the opposite: that the public needs in large cities are, if anything, greater than elsewhere, and that providing equal services costs, if anything, more in large cities than elsewhere.

From an economist's perspective, the consequences of population growth have been described as follows:

> As a city grows in population, land values increase because more people want to locate in the city and hence bid up rents. With higher rents, land use becomes more intensive as inhabitants economize on the use of a more expensive resource. This is another way of saying that urban density will increase ... With rents up, new migrants into an expanding city can be attracted only if they are paid enough to cover the new higher rents, which drives up wages. High rents also imply higher transportation costs, since there is a trade-off between locating at an increasing distance from the center and paying higher commuting costs ... Higher rents or transport costs, or both, cause general increases in the cost of living. Food costs, for example, increase because grocery store rents are higher and because grocery store clerks receive higher wages to cover their higher residential rents. Increased size and density generate congestion and pollution effects; it is often hypothesized that there will be other health and welfare effects that involve increased levels of social disorganization (delinquency, crime, insanity, and the like). Hoch, "City Size Effects, Trends, and Policies", *Science*, Vol 193, p. 856, Sept. 3, 1976.

This circular evolution of growing population, higher costs, and higher wages of course has its effect on city government finances. Tabulating data from nearly all U.S. cities, the Census Bureau has demonstrated that per capita costs of government increase as population increases. (R 132). The special population characteristics of large cities increase the fiscal burdens on large-city governments. For example, although New York's five largest cities, in 1970, contained 50% of the families in the state, they contained 67% of the families living in poverty. Of the families with children under 18, 44% of all such families lived in the largest cities, yet 77% of those families who lived in poverty and which had a female head of household lived in the largest

cities. Table 1[8], (R 128). Similarly, in the Rochester City School District, in 1969, 16.7% of the total enrollment was from families with incomes below the poverty level, while only 6.2% of the enrollment of surrounding school districts was from poverty families. The comparable percentages for Buffalo were 20.5% in the city, and 7.2% in the surrounding area. Table 2, (R 129).

In 1970, the percentage of families receiving public assistance in large cities was 9.3% for Buffalo, 6.7% for Rochester, 9.1% for Syracuse, while outside the state's six largest cities, that figure was only 3%. Table 3, (R 130). A similar trend is seen in crime statistics. In 1970, the crime rates in all of the state's largest cities exceeded crime in surrounding areas, varying from 45% greater in the City of Syracuse, compared to its surrounding area, to 231% greater in the City of Rochester compared to the area around the City. Table 4, (R 131).

The statistic which may explain most of the others, at least in part, is population density. Density in the City of Rochester is 31 times that of the surrounding area. In Syracuse the comparable figure is 43 times. Table 4 (R 131). These statistics demonstrate that inherent in increased population and population density are substantial problems with which city government must deal, and which are insignificant or absent in smaller jurisdictions.

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[8]The tables referred to, from the City's affidavit (R. 128-31) are as follows:

Table 1: *Selected Poverty Characteristics, 5 Largest Central Cities and Rest of State, 1970.*

Table 2: *Children Enrolled in Public School Grades K-12 in 1970 From Families With Incomes Below Poverty Level in 1969 by Selected Area.*

Table 3: *Selected Socioeconomic and Health Characteristics, Largest Cities and Rest of State, 1970, 1973.*

Table 4: *Selected Demographic and Crime Rate Statistics, 1970, Large New York SMSAs.*

A recent New York case vividly demonstrated the financial burdens which are characteristic of large cities. In *Board of Ed., Levittown Union Free School District v. Nyquist*,[9] No. 8208/74 (Sup. Ct., Nassau Co., June 23, 1978), after 122 days of trial extending over eight months, the court struck down New York's education aid system on equal protection grounds. That holding was based in part on specific findings by the court that the state's large cities, including Rochester, were hampered in their funding of school and city services by "municipal overburdens" and "educational overburdens". On the issue of municipal overburdens, the court found as follows:

> The intervenors presented convincing evidence in painstaking detail to establish that the higher non-educational expenditures in the cities are caused by the compelling, irresistible demands for municipal services that the urban environment and its characteristics create .... (slip op. at 45.)
>
> The conditions, characteristics and circumstances found in New York City were shown to be replicated in the three upstate cities [including Rochester]. Concentrations of the poor and the elderly, large numbers of persons on public assistance rolls, high levels of unemployment and low education levels have all combined to increase municipal expenditures. To the foregoing must be added the cost-producing factors of old housing stock, deteriorating municipal facilities and a severe economic decline in recent years. As the findings of fact show in more detail, when individual categories of non-educational municipal services are examined, the cities necessarily spent more than other areas of the State .... *Id.* at 46-47.
>
> The defendants did not present evidence contradicting the contention and proof of the intervenors that they had

[9]The Rochester Board of Education, along with the New York, Buffalo, and Syracuse boards, among others, were plaintiff-intervenors in this case. One copy of this opinion, as yet unreported, has been submitted to this Court.

> greater non-educational costs which diminished the extent of tax resources available to finance education. It was only the claim of the intervenors that such non-educational costs were inexorable that the defendants sought to disprove. The effort in that direction, however, was limited to evidence that audits by the office of the Comptroller of the State of New York had been critical of a portion of health and welfare expenditures in the City of New York. The defendants' witness, Netzer, while expressing the opinion that many of the cities' non-educational expenditures were not inexorable failed to undergird that opinion by showing how the cities could appreciably effect a reduction in those expenditures. *Id.* at 50.

In addition, the *Levittown* court found that extensive "educational overburdens" impaired the ability of large cities to adequately fund their school systems. These educational overburdens included a higher incidence of students' impaired learning readiness and impaired mental, emotional, and physical health, greater numbers of handicapped students and foreign language-speaking students, high student absenteeism (resulting in less state aid), and inadequate resources to deal with these problems (*Id.* at 67-77). The court further found that:

> Other factors have made it necessary for city school districts to pay higher salaries than in suburban and rural districts. The large urban school districts have had to pay more to maintain the level of teacher quality in the face of hiring competition from other school districts. Contributing to this have been such considerations as the need to teach large classes having a high percentage of disadvantaged pupils; the need to perform teaching assignments with inadequate materials and supplies in deteriorating buildings; and the anxiety produced by the violence and vandalism in many city schools. *Id.* at 53.

These findings of fact in the *Levittown* case support appellants' contentions that municipal and educational overburdens exist in the state's large cities, including Rochester, and

that these cities therefore require at least as much taxing power as the state's other municipal jurisdictions.

Clearly, then, the discriminatory scheme of tax limits in Article VIII, Section 10 cannot be justified on the basis of the taxing needs of the classified jurisdictions. Large cities, with the largest need for tax dollars, are given the lowest overall tax limit. Smaller cities and other municipalities, with a generally lesser need for tax dollars, are given a higher tax limit. Such a system, appellants submit, does not meet the requirements of rationality under the Equal Protection Clause.

D. *Conclusion*

Statutory classifications such as those in Article VIII, Section 10, must be rationally related to a legitimate state purpose. The preceding discussion of both the history and the current conditions related to the tax limits shows no rational basis for applying the limits so unequally. Furthermore, in this case, Waldert has not brought forth evidence of any such rationality.

These facts in this case remain uncontroverted:

> The residents of Rochester require at least as much taxing power as the residents of smaller jurisdictions to provide basic municipal and school services;
>
> The residents of Rochester and other large cities have substantially less taxing power, under Article VIII, Section 10, than the residents of other jurisdictions have.

No interpretation of these facts furnishes a rational basis — the minimal rationality required by the Equal Protection Clause — for the discriminatory classification in Article VIII, Section 10. Therefore, on the record in this case, summary judgment upholding the classifications in Article VIII, Section 10 should not have been granted.

E. *The equal protection analysis by the courts below was inadequate*

The foregoing discussion details appellants' analysis of the applicability of the Equal Protection Clause to the system of tax limits in Article VIII, Section 10. Appellants submit that the courts below failed to deal adequately with the equal protection issue and that their holdings are not supportable under this Court's pronouncements on equal protection.

In support of its holding on the equal protection issue, the Appellate Division below cited only one case: *Magoun v. Illinois Trust & Savings Bank*, 170 U.S. 283 (1898) (R 35). No more recent Supreme Court cases were cited; no New York cases were cited. The Court of Appeals, affirming the Appellate Division, made no reference at all to the equal protection issue. As discussed above, this Court has unequivocally repudiated such automatic deference to legislative classifications.

This Court has recently criticized an Illinois Supreme Court decision for its cursory analysis of equal protection issues.

> [T]he Equal Protection Clause requires more than the mere incantation of a proper state purpose . . . As we said in *Lucas*, the constitutionality of this law "depends upon the character of the discrimination and its relation to legitimate legislative aims." 427 U.S. at 504. The Court below did not address the relation between [the statute] and the promotion of [the asserted legislative goal], thus leaving the constitutional analysis incomplete. *Trimble v. Gordon*, 430 U.S. 762, 769 (1977).

Appellants submit that the brief analysis by the courts below does not constitute the type of searching equal protection analysis required by recent Supreme Court decisions such as *Trimble, Weisenfeld, Goldfarb* and *Craig*.

Also, the courts below gave no consideration to the possibility of less objectionable alternatives to the existing system of tax limits. See *Trimble*, 430 U.S. at 770-71. Tax limits could be

drawn which do not broadly discriminate between large-city residents and residents of other municipalities.

In summary, appellants submit that the equal protection analysis by the courts below was inadequate. This Court has made it clear that a court's equal protection analysis must include a thorough investigation into legislative classifications and their asserted purposes. As the Court said in *Trimble*, "mere incantations" of a proper state purpose or of a time-honored statute are not a sufficient basis for upholding a statute under the Equal Protection Clause.

As the constitutional analysis in the courts below was inadequate, this Court should reverse the summary judgment granted below, and remand for a proper factual inquiry and analysis.

POINT II

This Court should reverse the granting of summary judgment to appellee Waldert because there are triable issues of fact.

New York Civil Practice Law and Rules §3212(b) states that:

> Except as provided in subdivision (c) of this rule a motion [for summary judgment] shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.

Where the court entertains any doubt as to whether any material and triable issue of fact exists, summary judgment will be denied. 4 Weinstein, Korn, Miller, *New York Civil Practice* §3212.05(c).

In particular, summary judgment is likely to be inappropriate in cases involving government financing because of the relatively complex fact situations involved. *Askew v. Hargrave*, 401 U.S. 476, 479 (1971).

> Since the manner in which the program operates may be critical in the decision of the equal protection claim, that claim should not be decided without fully developing the factual record at a hearing. *Id.* at 479.

In the case at bar, there are material and triable issues of fact. In its affidavit opposing Waldert's motion for summary judgment, the appellant City of Rochester presented statistical data which demonstrates that it is irrational for the taxing power of large cities to be more restricted than the taxing power of small cities and other municipal jurisdictions. This data has been summarized in this jurisdictional statement, under Point I. The data indicates that large cities have public needs at least as great as those of other municipal jurisdictions. Therefore, it is arbitrary and without rational basis to classify jurisdictions so that the large cities have less taxing power than smaller jurisdictions.

The data that appellants have offered to support this conclusion has not in any way been refuted by Waldert. Waldert relies only on the legal conclusion that the classifications in Article VIII, Section 10 are permissible (R 105-06). Such unsupported assertions are inadequate to rebut appellants' factual showing. In a summary judgment motion, the moving party must present evidentiary facts clearly showing the validity of his cause of action and that a defense cannot be sustained, as a matter of law. 4 *Weinstein*, at 32-142.36. It was mandatory upon appellee Waldert to submit evidentiary facts or materials, by affidavit or otherwise, rebutting appellants' prima facie factual showing. *Indig v. Finklestein*, 23 N.Y. 2d 728, 729 (1968). *Bachrach v. Farben Fabriken Bayer AG*, 36 N.Y.2d 696, 697 (1975).

The Appellate Division below stated that it could not say that the tax limit classifications were "irrational or without a reasonable basis in fact" (R 34-35); the Court of Appeals, affirming the Appellate Division, made no reference to this issue.

However, it is just this "basis in fact" which should be investigated in this case. It was anomalous for the Appellate Division to hold that there is a factual basis for the rationality in the tax limits while, at the same time, holding that no trial was necessary — even though there has been no factual showing on this issue by Waldert. The facts in the record on the history and on the current effects of the tax limits support appellants' position that the tax limits are arbitrary and irrational. (R 133-39). Appellants submit that the courts below erred when they adopted a simple legal conclusion in deciding the equal protection issue and disregarded the considerable factual showing by appellants and appellants' argument that, on this complex issue, a trial is required.

Any doubt concerning whether there are triable issues of fact in this case was resolved by the *Levittown* case.[10] That case, like the case at bar, revolved around the relative tax burdens and taxing power of New York's local governments (slip op. at 7-8, 93-102). The parties in that case required 122 days of trial extending over eight months, with more than 23,000 pages of testimony, to present their evidence on these issues. *Id.* at 11. The *Levittown* case thus is aligned with this Court's view that issues of governmental financing are likely to be factually complex and, therefore, should not be decided "without fully developing the factual record at a hearing". *Hargrave*, 401 U.S. at 479.

In addition, as discussed under Point I, the *Levittown* court's findings support many of the appellants' substantive contentions in this case. Thus, not only does *Levittown* demonstrate that the issues in this case are factually complex, but also that the evidence at a trial would support the appellants' case. Ap-

[10] *Board of Ed., Levittown Union Free School District, et al. v. Nyquist, et al.*, No. 8208/74, (Sup. Ct., Nassau Co., June 23, 1978).

pellants submit that, especially in light of the *Levittown* decision, summary judgment to Waldert should be reversed.

Respectfully submitted,

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APPENDIX

THE CONSTITUTION OF THE STATE OF NEW YORK, ARTICLE VIII, SECTION 10

§10. **[Limitations on amount to be raised by real estate taxes for local purposes; exceptions.]** — Hereafter, in any county, city, village or school district described in this section, the amount to be raised by tax on real estate in any fiscal year, in addition to providing for the interest on and the principal of all indebtedness, shall not exceed an amount equal to the following percentages of the average full valuation of taxable real estate of such county, city, village or school district, less the amount to be raised by tax on real estate in such year for the payment of the interest on and redemption of certificates or other evidence of indebtedness described in paragraphs A and D of section five of this article, or renewals thereof:

(a) any county, for county purposes, one and one-half per centum; provided, however, that the legislature may prescribe a method by which such limitation may be increased to not to exceed two per centum;

(b) any city of one hundred twenty-five thousand or more inhabitants according to the latest federal census, for city purposes, two per centum;

(c) any city having less than one hundred twenty-five thousand inhabitants according to the latest federal census, for city purposes, two per centum;

(d) any village, for village purposes, two per centum;

(e) any school district which is coterminous with, or partly within, or wholly within, a city having less than one hundred twenty-five thousand inhabitants according to the latest federal census, for school district purposes, one and one-quarter per centum; provided, however, that if the taxes subject to this limitation levied for any such school district for its first fiscal year beginning on or after July first, nineteen hundred forty-

seven, were in excess of one and one-quarter per centum but not greater than one and one-half per centum, then for such school district the limitation shall be one and one-half per centum; or if such taxes were in excess of one and one-half per centum but not greater than one and three-quarters per centum for such fiscal year, than for such school district the limitation shall be one and three-quarters per centum; or if such taxes were in excess of one and three-quarters per centum for such fiscal year, then for such school district the limitation shall be two per centum. The limitation herein imposed for any such school district may be increased by the approving vote of sixty per centum or more of the duly qualified voters of such school district voting on a proposition therefor submitted at a general or special election. Any such proposition shall provide only for an additional one-quarter of one per centum in excess of the limitation applicable to such school district at the time of submission of such proposition. When such a proposition has been submitted and approved by the voters of the school district as herein provided, no proposition for a further increase in such limitation shall be submitted for a period of one year computed from the date of submission of the approved proposition, provided that where a proposition for an increase is submitted and approved at a general election or an annual school election, a proposition for a further increase may be submitted at the corresponding election in the following year. The legislature shall prescribe by law the qualifications for voting at any such election. In the event any such school district shall be consolidated with any one or more school districts, the legislature shall prescribe a limitation, not exceeding two per centum, for such consolidated district. Thereafter, such limitation may be increased as provided in this sub-paragraph (e). In no event shall the limitation for any school

district or consolidated school district described in this sub-paragraph (e) exceed two per centum.

The average full valuation of taxable real estate of such county, city, village or school district shall be determined by taking the assessed valuations of taxable real estate on the last completed assessment rolls and the four preceding rolls of such county, city, village or school district, and applying thereto the ratio which such assessed valuation on each of such rolls bears to the full valuation, as determined by the state tax commission or by such other state officer or agency as the legislature shall by law direct. The legislature shall prescribe the manner by which such ratio shall be determined by the state tax commission or by such other state officer or agency.

Nothing contained in this section shall be deemed to restrict the powers granted to the legislature by other provisions of this constitution to further restrict the powers of any county, city, town, village or school district to levy taxes on real estate.

(f) Notwithstanding the provisions of sub-paragraphs (a) and (b) of this section, the city of New York and the counties therein, for city and county purposes, a combined total of two and one-half per centum.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

STATE OF NEW YORK – COURT OF APPEALS

JEANNETTE C. WALDERT,

Plaintiff-Appellee,

—vs—

CITY OF ROCHESTER,

Defendant-Appellant,

THOMAS R. FREY,

Intervenor-Appellant.

Index # 15237/76

Notice is hereby given that the defendant-appellant City of Rochester, and the intervenor-appellant Thomas R. Frey, hereby appeal to the Supreme Court of the United States from that portion of the final order and judgment of the Court of Appeals of the State of New York, entered in the Court of Appeals on June 8, 1978, modifying and affirming the order and judgment of the Appellate Division of the Supreme Court, Fourth Department, granting summary judgment to the plaintiff-appellee Jeannette Waldert upholding the validity of Article VIII, Section 10, of the New York Constitution under the Fourteenth Amendment to the United States Constitution, and awarding a real property tax refund to the plaintiff-appellee.

This appeal is taken pursuant to 28 U.S.C. §1257 (2).

Dated: June 14, 1978

/s/ LOUIS N. KASH
Louis N. Kash
CORPORATION COUNSEL
ATTORNEY FOR APPELLANTS
CITY HALL
30 CHURCH STREET
ROCHESTER, NEW YORK 14614

Notice of Appeal to the Supreme Court of the United States

FILED
'78 JUN 15 PM 2:08
MONROE CO.
CLERK'S OFC.

TO: THE CLERK OF THE COURT OF APPEALS
COURT OF APPEALS OF THE
STATE OF NEW YORK
20 EAGLE STREET
ALBANY, NEW YORK 12207

THE CLERK OF MONROE COUNTY
COUNTY OFFICE BUILDING
ROCHESTER, NEW YORK 14614

JOHN VAN VOORHIS, ESQ.
ONE GRAVE STREET
ROCHESTER, NEW YORK 14614

CERTIFICATE OF SERVICE

STATE OF NEW YORK – COURT OF APPEALS

JEANNETTE C. WALDERT,

Plaintiff-Appellee,

—vs—

CITY OF ROCHESTER,

Defendent-Appellant,

THOMAS R. FREY,

Intervenor-Appellant.

STATE OF NEW YORK
COUNTY OF MONROE SS:
CITY OF ROCHESTER

Louis N. Kash, being duly sworn, says that he is over twenty-one years of age; that deponent served the within Notice of Appeal to the Supreme Court of the United States on John VanVoorhis, Esq., the attorney for the plaintiff-appellee therein named, on the 14th day of June, 1978, by depositing the same properly and securely enclosed in a sealed wrapper, with full postage prepaid thereon, in a post office box regularly maintained by the government of the United States, and under the care of the post office, at the City Hall of Rochester, New York, directed to said attorney at One Graves Street, Rochester, New York 14614, that being the address designated by him for that purpose upon the preceding papers in the within-entitled action, and the place where he keeps an office, and between which place there then was and now is a regular daily communication by mail. By this act, all parties required to be served have been served.

/s/ LOUIS N. KASH
Louis N. Kash

Sworn to before me this
14th day of June, 1978.
/s/ PATRICIA A. PUFFER

PATRICIA A. PUFFER
Notary Public in the State of New York
MONROE COUNTY, N.Y.
Commission Expires March 30, 1980

STATE OF NEW YORK, COUNTY OF MONROE ss:

I, F. ROSS ZORNOW, Clerk of the County of Monroe of the County Court of said County and of the Supreme Court both being Courts of Record having a common seal

DO HEREBY CERTIFY That I have compared this copy with the original filed or recorded in this office and that the same is a correct transcript thereof and of the whole of said original.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of said County and Courts on Jun 23, 1978.

F. Ross Zornow

Facsimile signature used pursuant to Sec. 903 of County Law.

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'78 JUN 15 PM 2:08
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CLERKS OFC.

REMITTITUR

COURT OF APPEALS
STATE OF NEW YORK
The Hon. Charles D. Breitel, Chief Judge, Presiding

No. 299

Jeannette C. Waldert,

Respondent-Appellant,

vs.

City of Rochester,

Appellant-Respondent,

and Thomas R. Frey,

Intervenor-Appellant-Respondent,

Hon. Louis J. Lefkowitz, Attorney General of the State of New York,

Intervenor.

The appellant-respondent and the intervenor-appellant-respondent in the above entitled appeal appeared by Louis N. Kash, Corporation Counsel of the City of Rochester; the respondent-appellant appeared by Van Voorhis and Van Voorhis; and Louis J. Lefkowitz, Attorney General of the State of New York appeared pursuant to Executive Law § 71, and this Court's order of April 27, 1978.

The court, after due deliberation, on May 9, 1978, having determined that the order of the Appellate Division, Fourth Department, entered January 28, 1978, should be modified, and chapter 349 of the Laws of 1976, as amended by chapter 485 of the Laws of 1976, declared unconstitutional, and having directed that the proposed remittitur be settled on 20 days' notice in a unanimous opinion *Per Curiam;*

Remittitur

The court, after further due deliberation of written submissions of the parties, orders and adjudges:

That the order of the Appellate Division, Fourth Department, be modified, by reinstating the judgment and supplemental judgment of the Special Term of the Supreme Court of the State of New York, held in and for Monroe County, granting to Jeannette C. Waldert recovery from the City of Rochester of the sum of $3,451.19, together with interest, and, as so modified, affirmed, with costs and disbursements to Jeannette C. Waldert to be taxed by the Monroe County Clerk against the City of Rochester;

That chapter 349 of the Laws of 1976, as amended by chapter 485 of the Laws of 1976, be declared unconstitutional;

That this remittitur and the relief accorded herein are effective immediately.

The court further orders that the papers required to be filed and this record of the proceedings in this court be remitted to the Supreme Court, Monroe County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/ JOSEPH W. BELLACOSA,
Joseph W. Bellacosa, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, June 8, 1978.

OPINION BELOW

Bethlehem Steel Corporation, Respondent, v Board of Education of the City School District of Lackawanna et al., Appellants; Louis J. Lefkowitz, as Attorney-General of the State of New York, Intervenor.

Jean W. Jones et al., Respondent-Appellants, v City School District of the City of Geneva, Appellant-Respondent; Louis J. Lefkowitz, as Attorney-General of the State of New York, Intervenor.

Jeannette C. Waldert, Respondent-Appellant, v City of Rochester, Appellant-Respondent; Thomas R. Frey, Intervenor-Appellant-Respondent; Louis J. Lefkowitz, as Attorney-General of the State of New York, Intervenor.

Argued May 2, 1978; decided May 9, 1978; remittiturs signed June 8, 1978

APPEARANCES OF COUNSEL

John J. Olszewski and *Peter A. Vinolus* for appellants in the first above-entitled action.

Albert E. Bond for appellant-respondent in the second above-entitled action.

Louis N. Kash, Corporation Counsel (Susan L. Hauser and *Barry C. Watkins* of counsel), for appellant-respondent in the third above-entitled action.

David K. Floyd and *David Alan Sands* for respondent in the first above-entitled action.

John Van Voorhis for respondents-appellants in the second and third above-entitled actions.

Louis J. Lefkowitz, Attorney-General (Jean M. Coon and *Ruth Kessler Toch* of counsel), in his statutory capacity under section 71 of the Executive Law.

Opinion Below

Harry Treinin for City School District of City of Corning, *amicus curiae.*

Joseph P. McNamara, Corporation Counsel of City of Buffalo (Stanley A. Moskal, Jr., of counsel), *amicus curiae.*

OPINION OF THE COURT

Per Curiam.

For the reasons expressed in the opinion of Mr. Justice Stewart F. Hancock, Jr., at the Appellate Division, chapters 349 (as amd by ch 485) and 484 of the Laws of 1976, insofar as it assigns a period of probable usefulness to the cost of current health and dental insurance coverage, are declared unconstitutional in their entirety. The challenged legislation, including the alternative State Real Property Tax Act (L 1976, ch 349, §3), presents nothing more than an attempt to circumvent the constitutional limitation upon the amount of revenue that may be raised by local subdivisions of the State through the taxation of real property. (NY Const, art VIII, §10.) On a previous occasion, this court has been constrained to strike down legislative measures in palpable evasion of those constitutional provisions designed to limit the taxing powers of local subdivisions of the State. (*Hurd v City of Buffalo,* 34 NY2d 628, 629, affg 41 AD2d 402.) For present purposes, chapters 349 and 484 of the Laws of 1976 are indistinguishable from the legislation struck down as unconstitutional in *Hurd (supra).* We would further add that section 7 of chapter 349, which purports to restrict the judicial authority to fashion remedies, constitutes a patently unconstitutional infringement on the powers of the judiciary.

In holding this legislation unconstitutional, we reject, as did the Appellate Division, defendants' contention that the fiscal crisis presently encountered by cities and school districts con-

stitutes an emergency justifying suspension of constitutional limitations pursuant to the emergency clause in the State Constitution. (NY Const, art III, §25.) Certainly, the present fiscal hardship, grave as it is, cannot seriously be equated with the emergencies contemplated in the Constitution: that is, enemy attack or other forms of disaster. (See *Flushing Nat. Bank v Municipal Assistance Corp. for City of N. Y.*, 40 NY2d 731, 740.) Thus, in holding unconstitutional the New York State Emergency Moratorium Act for the City of New York (L 1975, ch 874, as amd by L 1975, ch 875), we stated that the consequences of that legislation could "not be justified by fugitive recourse to the police power of the State or to any other constitutional power to displace inconvenient but intentionally protective constitutional limitations." (*Flushing Nat. Bank v Municipal Assistance Corp. for City of N. Y.*, 40 NY2d, at p 736.)

The State is not confronted with a situation in which it has no choice but to provide additional revenues for local government through the imposition of real property taxes in excess of the constitutional limitation. Obviously, real property taxes are not the only source of revenue available to support local subdivisions. Revenue for local subdivisions can be, and is, generated through various alternate vehicles.*

While we agree with the Appellate Division's affirmance of the judgments of Special Term declaring chapters 349 and 484 of the Laws of 1976 unconstitutional, we disagree with its conclusion that the plaintiffs in Jones v City School Dist. of Geneva and Waldert v City of Rochester are not entitled to repayment of

*See e.g., Tax Law, art 29, Taxes Authorized for Cities, Counties and School Districts; New York Lottery for Education (Tax Law, art 34); Corporation Tax (Tax Law, art 9); Franchise Tax on Business Corporations (Tax Law, art 9-A); Estate Tax (Tax Law, art 10-B); Mortgage Tax (Tax Law, art 11); Real Estate Transfer Tax (Tax Law, art 31); Stock Transfer Tax (Tax Law, art 12); Gasoline Tax (Tax Law, art 12-A); Alcoholic Beverages Tax (Tax Law, art 18); Cigarette and Tabacco Tax (Tax Law, art 20); Personal Income Tax (Tax Law, art 22); Highway Use Tax (Tax Law, art 21); Gift Tax (Tax Law, art 26-A); Sales and Use Taxes (Tax Law, art 28).

the taxes paid in excess of the tax limitation provided in the Constitution. Although in *Hurd (supra)* plaintiffs' award was limited to prospective relief because of their reliance upon the invalidated legislation in preparation of their budgets, the same rationale can no longer be applicable today. In view of *Hurd (supra)*, local subdivisions were put on notice that patent circumvention of constitutional limitations on their taxing powers would not be tolerated. Similarly, we believe that the plaintiff in Bethlehem Steel Corp. v Board of Educ. is entitled to establish its rights to repayment of real property taxes paid excess of the constitutional limitation if such taxes were paid under appropriate protest.

Accordingly, the order of the Appellate Division in Bethlehem Steel Corp. v Board of Educ. should be affirmed, with costs, and the orders of the Appellate Division in Jones v City School Dist. of City of Geneva and Waldert v City of Rochester should be modified, with costs, to reinstate the judgments of Special Term granting petitioners a tax refund, and, as so modified, affirmed. Chapters 349 and 484 of the Laws of 1976 are declared unconstitutional, and the proposed remittitur settled on 20 days' notice.

Chief Judge Breitel and Judges Jasen, Gabrielli, Jones, Wachtler, Fuchsberg and Cooke concur in *Per Curiam* opinion.

In *Bethlehem Steel Corp. v Board of Educ. of City School Dist. of Lackawanna:* Order affirmed, with costs, proposed remittitur to be settled on 20 days' notice.

In *Jones v City School Dist. of City of Geneva:* Order modified, with costs to plaintiffs, in accordance with the opinion herein and, as so modified, affirmed. Proposed remittitur to be settled on 20 days' notice.

In *Waldert v. City of Rochester:* Order modified, with costs to plaintiff, in accordance with the opinion herein and, as so modified, affirmed. Proposed remittitur to be settled on 20 days' notice.